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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CASE NO. 94-396

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES . . . . . ii-iii

ARGUMENT. 2

TABLE OF AUTHORITIES

PAGE(S)

CASES

Chao v. Commissioner
92 T.C. 1141, 1143 (1989). 9

Flood v. Commissioner
468 F.2d 904 (9th Cir. 1972),
cert. denied, 411 U.S. 906
(1973) 8

Hazel-Atlas Glass Co. v. Hartford
Empire Co.
322 U.S. 238, 246, 64 S.Ct. 997,
1001, 88 L.Ed. 1250 (1944) 10, 14

Heim v. Commissioner
872 F.2d 245, 249 (8th Cir. 1989). 8, 9

Kenner v. Commissioner
3387 F.2d 689, 690
(7th Cir. 1968). 9

Steinert v. Commissioner
1985 Tax. Ct. Mem. Dec.
(P-H) 85, 581, at 85-2601 to
85-2602. 12

Stickler v. Commissioner
464 F.2d 368,
370 (3d Cir. 1972) 9

Toscano v. Commissioner
441 F.2d 930 (9th Cir. 1971) . . . 9

STATUTES

United States Tax Court
Rule 24(f) 3

RULES AND REGULATIONS

ABA Model Rule of Professional
Conduct, Rule 1.7 3

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Law Office of Anthony P. Capozzi, on behalf of Petitioners Raymond V. Wizbowski and Barbara Wizbowski, respectfully submit the following reply to the brief in opposition of the Petition for Writ of

Certiorari submitted by Petitioners.

ARGUMENT

1. The Courts below erred in failing to consider attorney Harris' conduct in determining whether there was "fraud on the court" in the Tax Court proceedings.

In denying Petitioners' motion to vacate the prior Tax Court proceedings, the Tax Court determined that attorney Hawkin's undisclosed expectation of I.R.S. employment while representing the Petitioners did not constitute a fraud on the court sufficient to vacate the judgment in those proceedings. (Pet. App. 6-7).

This conclusion by the Tax Court, which was affirmed by the Court of Appeal, is erroneous. Clear error was committed by the refusal of the courts below to consider the conflict of interest inherent in Harris' representation during the Tax

Court proceedings. The courts below have blinded themselves to the serious misconduct of Harris during the Tax Court proceedings, despite evidence on the record of Harris' misconduct, and furthermore, despite an acknowledgment by the Tax Court that Harris' representation violated Tax Court Rule 24(f) (RT 97).

In opposition to the Petition for Writ of Certiorari, the United States argues that Tax Court Rule 24(f) has no bearing in this case because Petitioners were not Harris' clients and because the Rule was not adopted until after the trial in this case. (Opp. 8).

The United States ignores the fact that despite it's effective date, Rule 24(f) refers explicitly to ABA Model Rule of Professional Conduct 1.7, which provides that a lawyer is prohibited from representing a client if the

representation of that client will be directly adverse to another client, or the representation of that client may be materially limited by the lawyer's responsibilities to another client, third parties, or the lawyer's own interest.

Harris, as promoter of the partnership interests in question, had his own personal financial interest in the outcome of the Tax Court proceedings; a financial interest adverse to those of his clients.[1] Hawkins allowed Harris to take

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[1] The United States argues that "a successful defense by Harris of Petitioners' claimed deductions would benefit Harris by eliminating any potential personal liability he might have to the investors who entered the partnerships under his advice (Opp. 8). However, if the courts below would have properly considered Harris' conduct during the tax court proceedings, Petitioners would have shown how Harris ultimately received approximately $2,000,000 as a result of the taxpayer's adverse judgment in the tax court proceedings. Although Petitioners presented evidence in the hearing to vacate that the mobile home park was eventually sold through bankruptcy for $6,000,000, the tax court continued to ignore the misconduct and conflicts of interest inherent

the lead in advocating the allowability of the deductions in the Tax Court proceedings, a fact which is acknowledged by the United States. (Opp. 7). This issue was the crux of the Tax Court proceedings below. (Opp. 2). For the courts below to ignore the egregious misconduct of Harris, and the obvious effect this had on the outcome of the proceedings below is to condone misconduct of an officer of the court of the most egregious kind: having a personal, financial stake in the outcome of the proceedings which is adverse to those of his clients. For the courts below to ignore the fact that an attorney could financially benefit by allowing his clients to suffer defeat at trial is clearly erroneous. This court must exercise it's jurisdiction under these

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in Harris' representation of the taxpayers.

most egregious facts.

The United States attempts to explain away this misconduct by arguing that Petitioners were separately represented by Hawkins, the counsel of their choice. (Opp. 8).

This statement ignores the fact that Petitioners were unaware of the agreement which Hawkins had with Harris during the Tax Court proceedings, and were in fact, unaware that Harris had sole responsibility for, and control over, advocating the allowability of the deductions. (RT 43). After testifying during the Tax Court proceedings, the Petitioners were instructed by Hawkins to go home. (RT 44).

As a result, Petitioners were never made aware of the fact that Harris was solely responsible for Petitioners' success during the Tax Court proceedings.

Petitioner Barbara Wizbowski further testified during the motion to vacate that she would never authorize Hawkins to rely on Harris during the Tax Court proceedings because she had a major conflict with Harris over Harris' mishandling of the Petitioners' pension fund money. (RT 42-43).

While the other taxpayer's may have consented to Harris' representation, the Petitioners were completely unaware that Hawkins had agreed to allow Harris to take the lead as to the main issue in the Tax Court proceedings.

The courts below clearly erred in refusing to examine the misconduct of Harris. As a result, the courts below solely focused on Hawkin's conflict of interest, and in turn, found no fraud on the court. As will be shown below, the egregious facts in the present case,

involving the representation of Petitioners in the Tax Court proceedings, constitute a fraud on the court which justifies a vacation of the Tax Court decision.

2. In opposition to Petitioners' Petition for a Writ of Certiorari, the United States argues that Harris' representation of the Petitioners during the Tax Court proceedings at issue did not constitute a fraud on the court.

The Tax Court below acknowledged a conflict of interest between Harris and Petitioners. (RT 97). The United States however, argues that a conflict of interest existing between attorney and client does not constitute a fraud on the court, citing Heim v. Commissioner, 872 F.2d 245, 249 (8th Cir. 1989); Flood v. Commissioner, 468 F.2d 904 (9th Cir. 1972), cert. denied, 411 U.S. 906 (1973);

Kenner v. Commissioner, 387 F.2d 689, 692 (7th Cir.), cert. denied, 393 U.S. 841 (1968); and Chao v. Commissioner, 92 T.C. 1141, 1143 (1989). (Opp. 7-8).

The above cases demonstrate a recognition by the courts that an allegation of attorney misconduct, merely amounting to negligence, does not constitute a fraud upon the court. See Heim v. Commissioner, 872 F.2d at 248; Kenner v. Commissioner, 387 F.2d at 692; Chao v. Commissioner, 92 T.C. at 1143.

In essence, fraud on the court is not found where the client, and not the court, is alleged to have been the only victim of the fraud. See Heim v. Commissioner, 872 at 248; Stickler v. Commissioner, 464 F.2d 368, 370 (3d Cir. 1972); Toscano v. Commissioner, 441 F.2d 930, 933 (9th Cir. 1991).

To constitute fraud on the court, it

is necessary to show a deliberately planned scheme designed to improperly influence the court in its decision. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

The United States however, and the courts below, are ignoring the conflict of interest inherent in Harris' representation of Petitioners in the Tax Court proceedings. The conflict of interest which Petitioners are alleging on behalf of Harris is not mere negligence or inadequate representation.

Hawkins did not inform the Petitioners that Harris would be solely responsible for advocating the allowability of the deductions in issue. This allowed Harris to steer the Tax Court proceedings in a manner which benefitted him personally, to the detriment not only

of his clients, but to Petitioners, who were not even aware that their fate was in Harris' hands.

Here, Petitioners allege that Harris, as the General Partner of the partnership, and the lead attorney in the Tax Court proceeding, had a substantial financial interest in the outcome of the litigation, adverse to that of the Petitioners. (Pet. 14-15). Unknown to Petitioners, or the Tax Court, Harris stood to gain $2,000,000 by losing the Tax Court case.

At issue in the Tax Court proceedings were the Petitioners' entitlement to loss deductions for the partnership formed and promoted by Harris. The Petitioners, along with the other limited partners of the partnership, lost the Tax Court case based on a finding that the partnership's purchase of the mobilehome park was a sham

transaction.[2] Steinert v. Commissioner, 1985 Tax Ct. Mem. Dec. (P-H) 85, 581, at 85-2601 to 85-2602.

However, the interests of Petitioner in the Tax Court proceedings were dissimilar to the interests and claims of Harris and the partners he represented. Unlike the other limited partners of the partnership, Petitioners sold their partnership interest to Harris in 1979, when Petitioners began to distrust Harris. Petitioners recaptured the prior partnership losses on their 1979 tax return and paid a tax on the gain from the sale of their partnership interest. Despite the fact that Petitioners had already recaptured the loss and paid tax

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[2] Unknown to the partnership, Harris personally purchased the mobilehome park, marked up the price, then sold the mobilehome park to the partnership, naming Harris' company as the general partner.

on the gain, the I.R.S. disallowed the prior loss deductions of the partnership, including those taken by Petitioners, and assessed a tax on Petitioners.

Unlike the other partners of the partnership, who presumably paid their tax and penalties from their gain on the eventual sale of the mobilehome park, Petitioner was not a partner and did not share the benefit of that sale. It was because of the prior sale of Petitioners' interest in the partnership, and their recapture of the loss and tax on the gain, that Petitioners sought representation by Hawkins. However, it was Harris, not Hawkins who ostensibly represented Petitioners.

It was the undisclosed financial interest of Harris in the outcome of the Tax Court proceedings, and the obvious reluctance of Hawkins to defend

Petitioners interests in the face of a job offer with the I.R.S., which undermined the very integrity of that judicial process, rendering Petitioners, and the Tax Court, victims of the deception and fraud occasioned by these adverse, undisclosed interests.

The Supreme Court has defined fraud on the court in terms of whether the alleged misconduct "harms" the integrity of the judicial process:

"Tampering with the administration of justice...involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246 64 S.Ct. 997, 1001, 88 L.Ed. 1250 (1944).

If the courts below had considered the effect of Harris' participation in the Tax Court proceedings, and on the adverse outcome to the Petitioners, "fraud on the court" as set forth by this court above, would have been found. The courts below erred in refusing to take Harris' representation of Petitioners into account.

Dated: November 3, 1994.

Respectfully Submitted,

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